United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7062

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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SIDNEY DANIELSON, Regional Director, Region 2 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

P/S

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondent-Appellant.

RESPONDENT-APPELLANT'S REPLY BRIEF

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RESPONDENT-APPELLANT'S REPLY BRIEF

INTRODUCTORY STATEMENT

This reply brief deals both with the contentions made by General Counsel of the National Labor Relations Board ("Board") and those made by Seatrain Lines, Inc. ("Seatrain") in its amicus brief.*

ARGUMENT

I

The Board flatly concedes (Bd Br* 22, ftnte 15), and Seatrain in effect concedes, the point made at pages 15-17 of our principal brief: that the International Organization of Masters, Mates and Pilots ("MM&P") has not violated Section 8(e) in seeking to arbitrate violations by Seatrain of Section V(1) of the collective agreement. Under these contractual provisions,

* The Board's Brief will be referred to as "Bd Br" and Seatrain's as "Sea Br." As in our principal brief, the Joint Appendix will be referred to as "JA," the District Court Transcript as "Tr" and the Exhibit Volume as "ExPg."

MM&P seeks to arbitrate whether the new "owner," "charterer," "operator" and/or "agent" of the T/T Brooklyn and the T/T Williamsburg were bound to Seatrain's collective agreement with MM&P as "subsidiaries and affiliates" of Seatrain within the meaning assigned to those terms by section V(1)(b) of the collective agreement (ExPg 16).

Only the Board, and not any private party, is entitled to seek relief under Section 10(1) of the Act; and Seatrain (as amicus and not intervenor), therefore, has standing only to support such claims as the Board sees fit to press. Amazon Cotton Mill v. Textile Workers Union, 167 F. 2d 183 (4th Cir. 1948); Amalgamated Ass'n v. Dixie Motor Coach Corp., 170 F. 2d 902 (8th Cir. 1948); Solein v. Miscellaneous Drivers and Helpers Union Local No. 610, 440 F. 2d 124 (8th Cir. 1971); Department Store Service Inc. v. Doe, 98 F. Supp. 870 (E.D.N.Y. 1951). Accordingly, the Board's concession as to the propriety of MM&P's alternative claim under Section V(1) of the agreement is dispositive for purposes of this proceeding. Nevertheless, the order appealed from enjoins arbitration of that claim, and to that extent, at least, cannot be defended.

Assuming, arguendo, that the Court undertakes to consider Seatrain's argument as to why this alternative claim should not be arbitrated, we submit that the Seatrain contention is without any merit.

By contractual command, as we pointed out in our principal brief (p. 15), the question whether the new owner, charterer, operator, etc. is bound by the agreement, turns on

whether or not Seatrain "effectively controls" the new owner, charterer, agent or operator. "Control" is plainly distinct from ownership or corporate relationship. "Control" can be exercised without ownership and without any corporate relationship. Thus, Mr. Hess' conclusory assertion on cross-examination that Wilmington Trust, GECC, Kingsway, East River and Anndep were not "corporately related" to Seatrain (Tr. 23) is not only incomplete as to the names of the companies involved and their several functions, but is also conceptually incomplete. For it omits the one element referred to in Section V(1)(b) of the collective agreement: "effective control." "Control" can be exercised in a host of different ways, of which "ownership" and "corporate relationship" are but two illustrations. Yet another method of exercising control, for example, is through contractual obligation. Respondent sought to adduce evidence bearing on this point, but it was rejected (Tr. 97, 100).

Nor is this issue a post-hearing afterthought as Seatrain, but not the Board, contends (Sea Br 26). The issue of a Section V(1) violation was raised by MM&P from the outset. In its arbitration demand (Pet. Ex. 4), MM&P defined its grievance as being Seatrain's

> "... failure to man or to secure the manning of ..." (ExPg 78)

the Williamsburg pursuant to the Seatrain-MM&P collective agreement. This precisely sets forth the two alternative claims. "Failure to man" assumes Seatrain "control" of the new "owner, agent, operator or bareboat charterer" under

section V(1) of the agreement. "Failure ... to secure manning" assumes sale to a non-controlled party and seeks damages for the breach. Seatrain concedes that MM&P "invoked" the terms of section V(1) of the collective agreement (Sea Br 25), but then follows with the erroneous non sequitur that MM&P "never claimed" that the transferees or operators of the vessels were "subsidiaries" or "affiliates" of Seatrain.

Nor was there any "disclaimer" of this grievance by MM&P counsel in the District Court, as Seatrain contends (Sea Br 25-26, 59). MM&P counsel merely responded to the Court's inquiry about a sale by Seatrain to a subsidiary of "their own" (Tr. 78-9), that is, a subsidiary in the corporate ownership sense of the word, and that only. There was no question put as to a sale to a controlled party, and even the limited inquiry related only to the purchaser of the ships, not the "charterer, operator or agent." The question was narrow and the response met the question head on.

The contention in Seatrain's brief that MM&P referred to subsidiaries and affiliates of Seatrain in order to reach sales "by" corporate affiliates of Seatrain is hardly illuminating. We did use the contractual clause for that purpose, but we did not limit its use to that purpose.

Finally, Seatrain claims that there was "no evidence" that the new owners, agents, operators, or bareboat charterers of the T/T Brooklyn or the T/T Williamsburg were affiliates or subsidiaries (Sea Br 59-61). That, we strongly urge, was neither an issue for the District Court nor the question before

the Board in the unfair labor practice proceeding. That issue is for the arbitrator alone, the parties' agreed-upon tribunal for the resolution of all contract disputes. For if it is conceded, as both the Board and Seatrain do, that the Section V(1) claim does not involve any statutory violation, then there is no reason for respondent to establish its arbitral claims before either Court or Board; and we made no attempt to do so. It was and is enough for us to show that the issue has been raised by proper arbitration demand. This we have done.

II

Contrary to the contentions of both the Board and Seatrain, this Court in Commerce Tankers (NLRB v. National Maritime Union, 486 F. 2d 902 (2d Cir. 1973), cert. den'd, 40 L.Ed. 559) did not hold the contract clause in question to be facially invalid; although we have noted in our principal brief the significant distinctions between the NMU clause and the provisions of the MM&P contract herein.

In Commerce Tankers the Court, acknowledging that the case presented a close question of work preservation as against secondary activity, emphasized "the practice of the shipping industry," the contractual arrangement by which all employees were displaced upon sale of a ship, the long-standing union agreements between the purchaser and the rival labor organization, and the secondary activities provoked by the NMU which, among other things, totally immobilized the vessel. The weight obviously given to all these factors in the Court's opinion simply cannot be reconciled with the claim of facial invalidity.

We need not belabor the point that none of these factors is present here.

Significantly, both the Board and the Seatrain briefs concede that under the MM&P agreement, unlike the NMU contract in Commerce Tankers, covered employees are entitled to remain on a purchased vessel for the balance of their six-months articled period of employment. The clear implication of this concession is that, at the very least, an arbitrator is empowered to grant damages measured by the loss of work to these classes of employees for the balance of the guaranteed period. It may be that this is all an arbitrator would award, bearing in mind the provisions of the MM&P contract and this Court's decision in Commerce Tankers. Perhaps additional damages might also be established; perhaps not. But MM&P is at least entitled to have this issue presented to an arbitrator and seek such damages as it can demonstrate within the normal standards of the arbitral law of damages.*

With regard to the Board's argument (Bd Br 19-21) that so-called "union signatory" clauses have generally been held

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* We remain cognizant of the fact, pressed by both the Board and Seatrain, that MM&P members did not man the Brooklyn or the Williamsburg prior to sale. We persist in viewing this as legitimate matter to be raised before the arbitrator, but not a basis for Section 8(e) liability. For Seatrain has conceded that the Williamsburg was constructed with proceeds from the sale of other Seatrain ships, since laid up; and MM&P is entitled to seek to prove before the arbitrator that the same applies to the Brooklyn. In an industry in which, for technological or other reasons, old vessels are constantly being replaced by newer ones, it is fair argument to an arbitrator that the replacement stands in the shoes of its predecessor, and MM&P personnel aboard the predecessor vessels are, in reality, the employees whose jobs were lost through sale of the two ships in issue. Seatrain's exaggerated analogy of selling trucks and opening a textile mill (Sea Br 22) is no analogy at all. We are talking of a single industry, and ships replace other ships as an ongoing process. The significance of this is for the arbitrator.

illegal, the Board totally overlooks the difference between the maritime industry and other industries. In most industries, if a plant or a business is sold but the successor continues operations at the same location, there is no necessary or even likely displacement of employees, and therefore a union's insistence on binding the successor through its agreement with his predecessor may be viewed as an attempt to protect the interests of the union rather than the employees.

In maritime this is not so. Because of the prevalence of union hiring halls, the question of which employees man the ship is determined exclusively by which union holds the contract. If a ship is sold to a company which then contracts with another union, then under the hiring hall system all the former union's adherents will be displaced and members of the new union will be dispatched from that union's hiring hall. This is particularly so with supervisory employees. Thus the only way a maritime organization such as MM&P can protect the employees serving upon the ships of a particular company, is to assure that a purchaser (at least one unencumbered by other union commitments) deals with it and does not, instead, contract with another union having its own hiring hall. An "area standards" clause that assures merely the successor's conformity to established area labor standards will be ineffectual in preserving the work or jobs of members of the contracting union. Thus in the maritime industry, a clause such as this is indeed calculated to preserve the jobs of the employees and not to serve some other interest of the union. That is undoubtedly why this Court in Commerce Tankers, which did involve the maritime industry, devoted such attention to the extra-contractual evidence of secondary activity and the particular

industry practices as to employee displacement, not present here, which tended to negative a work preservation objective.

III

Seatrain inaccurately contends that MM&P's arbitration demand sought to affect the rights of pu hasers and operators of the two vessels (Sea Br 25-26) and erroneously argues that even a damage demand against Seatrain is secondary rather than primary (Sea Br 28-31).

The factual error stems from Seatrain's persistent failure to recognize the alternative claims set forth in the arbitration notice: the "failure to man or secure the manning" language discussed above. MM&P does, indeed, seek to affect the rights of purchasers and operators, but only if they are under Seatrain's control and thus bound by the agreement. This is the first alternative claim. But MM&P has made no effort to affect purchasers or operators under the other alternative grievance under Section V(2) of the agreement. And, most important, MM&P has shown its good faith by taking absolutely no steps to interrupt or impede construction or operation of either vessel; it is content to await the results of the arbitration it has peacefully sought for months.

Legally Seatrain's argument is equally misplaced. Even Seatrain admits that a contractual work preservation clause is legal even if it requires cessation of business with a neutral third party (Sea Br 29, ftnte). The cases dealing with the "express-implied" point are totally inapposite. They hold only that when an agreement is aimed at the labor relations of neutrals -- in other words, when it is truly

secondary in thrust -- then it is in violation of Section 8(e) whether the agreement be express or implied.

The case of Amalgamated Lithographers of America Local 17, 130 NLRB 985 (1961), enfd. in part, 309 F. 2d 31 (9th Cir. 1962), cert. den., 372 U.S. 943, so heavily relied upon by Seatrain, presents a typical example of a secondary agreement. That case, as both the Board and the Court found, concerned pure secondary activity. At issue was a so-called "trade shop" clause, designed to cut off the employer's business with struck or non-union third parties. The plain objective was not to preserve any jobs with the primary employer but to influence the labor relations of the third party. The disputants were the union and the third party, not the neutral contracting employer. This is classic secondary activity, and it was, therefore, immaterial that the agreement to sever business with the third party was implied, not express.

Here there is no such triangulation. The disputants are the union and the primary employer, and there is no union-third party dispute. MM&P is looking to its primary employer only, within neither overt nor covert secondary implications. MM&P seeks to hold Seatrain liable for the company's contract breaches in violating its own obligations to MM&P, and not by reason of any dispute between MM&P and some third party. The objective is to preserve MM&P jobs with the Seatrain fleet.

Not only is the agreement itself primary in thrust but it is sought to be enforced against the primary party only,

through money damages payable by the primary party alone, with the secondary parties remaining free to operate the vessels however they see fit. Under the circumstances, it would be entirely irrelevant, under the authorities cited in Seatrain's own brief, whether or not the arbitral demand for damages from Seatrain had an effect in shaping hypothetical future sales of ships not now in construction in a shipyard which is entirely inactive (see p.14, infra).

IV

The efforts by both the Board and Seatrain to suggest the inapplicability of the Collyer deferral-to-arbitration rule (our principal brief, pp. 29-35) are thin and unpersuasive.

1. Operating Engineers Local 701, 216 NLRB No. 45 (1975), cited by Seatrain, is inapposite. First, in that case arbitration had already been held and the arbitrator had declined to pass on the claim of illegality. In that respect, it parallels Commerce Tankers in which the same thing occurred (see our principal brief, p. 35). Second, the Board noted that it was passing on facial invalidity alone; there was no Section 10(b) problem. Here, because of Section 10(b) we are concerned with the implementation of a clause adopted well over six months prior to the filing of the charge.

2. We find it hard to believe that Seatrain seriously challenges the arbitrator's power to entertain and determine a Seatrain claim of Section 8(e) illegality. Significantly, the Board makes no such contention. The issues in arbitration would include the question of whether Seatrain violated the

agreement and whether its non-performance (if found) could or should lead to a damage award. The latter issue clearly permits consideration of claims of illegality. And all these issues are well within the scope of the arbitral jurisdiction over matters of "interpretation or performance of this Agreement" (ExPg 70).

3. There is nothing inconsistent between Board power under section 8(e) and the Board policy of deferral. The very words of Section 8(e), as shown in our principal brief (p. 33), contemplate judicial and arbitral intercession. For contracts proscribed by Section 8(e) are made, by the very terms of the statute, "to such extent unenforceable and void." Determinations of unenforceability or invalidity are the staple business of a judicial or arbitral forum. The statute thus confirms the special appropriateness of deferral to arbitration where contentions of "hot cargo" invalidity are raised.

4. The references to possible strikes or strike threats stemming from the contractual reservation of a right to strike are entirely inapposite. The Board and Seatrain both appear to forget that the validity of the agreement as such is not at issue because of the six months statute of limitations. Only its implementation may be challenged. And the record is clear that there have been no strikes or strike threats, only a peaceful demand for arbitration.

5. The very recent decision in Squillacote v. Graphic Arts International Union, F. 2d (7th Cir. March 17, 1975) heavily relied upon by the Board (Bd Br 34-35) has no relevance to this case. There the union engaged in economic

action in furtherance of a secondary boycott. Naturally the Board sought Section 10(l) relief against the continuing economic action while acknowledging -- as did the Seventh Circuit -- that the underlying dispute was appropriate for arbitral resolution. Here, of course, there is no economic action. No effort has been made to change the status quo pending arbitration. Thus the justification for invoking Section 10(l) in Squillacote is entirely absent here; and that decision, in reaffirming the appropriateness of arbitration, actually supports MM&P's position.

6. Both the Board (Bd Br 33) and Seatrain (Sea Br 54) repeat the claim made below, that rights of unrepresented third parties would somehow be affected by deferral to arbitration of the damage claim against Seatrain. We did not understand this point below, and we still do not.

7. Todd Shipyards Corp. v. Marine Workers Local 39, 344 F. 2d 107 (2d Cir. 1965), quoted at p. 56 of Seatrain's brief, involved a reconciliation of Section 301 jurisdiction with that of the NLRB, not the question of permitting initial decision by the arbitration forum selected by the parties. On the latter point, this Court in United Optical Workers v. Sterling Optical Co., Inc., 500 F. 2d 220, 224 (2d Cir. 1974), distinguished Todd Shipyards as follows:

> "In Todd Shipyards we held that an employer's action under section 301 for a declaratory judgment that a hot cargo clause is unenforceable is not barred because of the NLRB's concurrent jurisdiction. We were concerned with coordinating competing district court and NLRB jurisdiction and we struck the balance in favor of the forum chosen by the plaintiff. The present case involves coordinating section 301 jurisdiction with an arbitration clause which by its

terms covers the dispute. These facts require consideration of policies distinct from those governing Todd Shipyards. In a section 301 action to compel arbitration the court must give full scope to the arbitration clause. Our national labor policy encourages the settlement of labor disputes through arbitration ...."

8. The Board cites two cases in support of its contention that a §10(1) injunction should issue even if the Collyer deferral doctrine applies (Bd Br 34, 35). The first, Carey v. Westinghouse Electric Co., 375 U.S. 261 (1964), is directly to the contrary. The Court there held, 375 U.S. at 272:

> "However the dispute be considered -- whether one involving work assignment or one concerning representation -- we see no barrier to use of the arbitration procedure. If it is a work assignment dispute, arbitration conveniently fills a gap and avoids the necessity of a strike to bring the matter to the Board. If it is a representation matter, resort to arbitration may have a pervasive, curative effect even though one union is not a party.
>
> "By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to 'industrial peace' (Textile Workers v. Lincoln Mills, supra, at 455) and which may be dispositive of the entire dispute are encouraged. The superior authority of the Board may be invoked at anytime. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area."

The second case, McLeod v. AFTRA, 234 F. Supp. 832 (SDNY 1974), aff'd 351 F. 2d 310 (2d Cir. 1965), predates this Court's decision in United Optical Workers v. Sterling Optical Co. by about ten years and the Board's 1971 Collyer doctrine by six years. The authority of earlier decisions in this area has simply been eroded by the new developments of the last decade leading to the principles articulated in Sterling and the Board's own formulation and elaboration of the Collyer doctrine.

V

Certain misleading or erroneous assertions in the opposing briefs should not go unanswered.

1. Both the Board and Seatrain depict Seatrain's shipbuilding endeavor as a vital ongoing activity threatened by MM&P's effort to obtain arbitral determination of its grievances. Thus Seatrain claims that at stake in this case is the right and financial ability of Seatrain Shipbuilding "to sell one, possibly two, vessels a year" (Sea Br 4). The picture is a false one. For economic reasons wholly unrelated to this proceeding -- including the collapse of the tanker market -- Seatrain has suspended its shipbuilding and closed its shipyard. The Court has but to note Exhibit F to appellant's motion for a preference on this appeal, a reproduction of a New York Times article on January 23, 1975, reporting Seatrain's layoff of 1800 workers in its Brooklyn yard, constituting "virtually all its employees." From more recent press coverage, the Court can take judicial notice that Seatrain Shipbuilding has suspended its operations. Any implication of jeopardy to an ongoing business enterprise is thus doubly false.

2. Seatrain disputes our assertion that the purchasers and operators of the two vessels had no competing union commitment and were free to contract with MM&P; for, says Seatrain, Westchester Marine had a prior union contract (Sea Br 9). The testimony is that Westchester Marine had an agreement with District 1 MEBA (Tr. 47), but that argument did not cover the T/T Brooklyn or the T/T Williamsburg. For those ships,

Westchester Marine made a special, subsequent contract with another organization, District 2 MEBA (Tr. 46). But in any event, Westchester Marine was not Seatrain's buyer nor the bareboat charterer nor even the operating agent but simply a labor contractor; and nothing in the sale or charter arrangements mandated dealing with Westchester Marine. That firm was simply the means by which unencumbered buyers, charterers and operators came to have their vessels manned by MEBA.

CONCLUSION

For all the reasons set forth above and in our principal brief, we urge that the injunction order appealed from be reversed and the petition dismissed.

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Reply Brief is admitted this
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